

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the PERA Salary
Determinations Affecting Retired and
Active Employees of the City of Duluth,
Allen Johnson, et al., Petitioners

**ORDER AWARDING
FEES AND EXPENSES**

This matter came before Administrative Law Judge Bruce H. Johnson ("ALJ") on November 28, 2012, on the Application by Petitioner Douglas Michog, on behalf of all the Petitioners, for fees and expenses pursuant to Minn. Stat. § 14.472(a). The Application was filed on September 17, 2012. The ALJ bifurcated the hearing in this matter into two stages—the first to determine whether the Petitioners are entitled to obtain fees and expenses pursuant to Minn. Stat. § 14.472(a) and the second, if necessary, to determine the amount of fees and other expenses.

On December 21, 2012, the ALJ entered an Order Allowing Fees and Expenses determining that the Petitioners were entitled to an award of fees and expenses pursuant to Minn. Stat. § 14.472(a). That Order scheduled a hearing for Monday, January 7, 2013, on the amount of awardable fees and expenses. The parties subsequently waived their rights to a further hearing and stipulated that the ALJ could enter an award based on a written record. Thereafter, the parties submitted affidavits and written briefs pertaining to the amount of the award. The OAH hearing record in this matter closed for all purposes on January 23, 2013, when all of the parties' written submissions were received.

Elizabeth A. Storaasli, Dryer Storaasli Knutson & Pommerville, Ltd., appeared on behalf of the Petitioners. Kevin Finnerty, Assistant Attorney General, appeared on behalf of the Board of Trustees of the Public Employees Retirement Association (PERA).

FINDINGS

1. The ALJ incorporates Findings 1 through 11 of the Order Allowing Fees and Expenses entered in this proceeding on December 21, 2012.

2. Sixty percent of the affected City of Duluth employees have not yet retired,¹ and the benefits those employees will ultimately receive are still subject to many variables. PERA therefore cannot currently compare with accuracy the total

¹ The results in the underlying administrative proceeding and subsequent appeal are not confined to the named Petitioners. At the prehearing conference in the underlying administrative proceeding to adjudicate PERA's claims ("contested case"), PERA stipulated that it would accord any City employees who had not filed petitions for review the same treatment as those who had filed Petitions for Review.

amounts of benefits that it originally sought to recover with the total amounts that the Court of Appeals' decision allows it to recover.²

3. After the Court of Appeals remanded the underlying case to PERA to carry out the Court's decision, PERA hired Samuel Morse, an outside consultant, to write computer software and assist in the recalculation of retirement benefits.³

4. Mr. Morse reviewed a total of \$20,368,509 in deferred compensation and insurance supplement payments that the City of Duluth had previously reported as PERA salary. He has estimated that \$14,948,359.91 of that amount was attributable to deferred compensation payments which the Court of Appeals found to be valid PERA salary. The remaining \$5,420,150.88 was attributable to insurance supplement payments which the Court of Appeals confirmed were not valid PERA salary.⁴ Although those amounts may change somewhat when individual audits are performed, both parties consider those amounts to be reasonable estimates of the total City of Duluth payments that were at issue in the contested case.⁵

5. PERA originally estimated that it would be recovering \$1,242,000 in retirement benefit overpayments from City of Duluth retirees. After Mr. Morse completed his recalculations, it now appears that PERA will only be recovering \$290,000 in benefit overpayments from those retired employees.⁶

6. Counsel for the Petitioners charged them \$220 per hour for the legal work performed while representing them in the contested case.⁷ That \$220 hourly rate was \$20 per hour less than the \$240 rate that they charged to a majority of its clients for similar services in 2011-2012.⁸

7. In 2011 the nationwide average rate for all attorneys was \$284 per hour. In the same year, the average billing rate for all attorneys practicing in the Midwest was \$264 per hour.

8. In 2011, the national average billing rate for firms of 2 to 8 lawyers was \$262 per hour. No average billing rate information is available for firms of 2 to 8 lawyers in the Midwest in 2011.⁹

9. The law firm that represents the Petitioners can be classified as a small law firm of 2 to 8 lawyers.

² Affidavit of Barb Bibeau at ¶¶ 5 and 6.

³ Affidavit of Mary Ostman at ¶ 2.

⁴ *Id.* at ¶ 3.

⁵ *Id.*; Affidavit of Barb Bibeau at ¶ 7.

⁶ *Id.* at ¶ 5.

⁷ Affidavit of Elizabeth A. Storaasli at ¶ 4.

⁸ *Id.*

⁹ *Id.*

10. Counsel for the Petitioners performed 476.3 hours of legal services while representing the Petitioners in the contested case.¹⁰

11. Counsel for the Petitioners' counsel charged them a total of \$7,354.48 in expenses while representing the Petitioners in the contested case.¹¹

12. Petitioner Paul Ostman incurred an expense of \$1,281.95 by purchasing a copy of a transcript of hearing in the contested case.¹²

13. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

14. To the extent that the Memorandum that follows explains the reasons for these Findings of Fact and contains additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

15. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The ALJ incorporates Conclusions 1 through 7 of the Order Allowing Fees and Expenses entered in this proceeding on December 21, 2012.

2. The Petitioners' application was properly filed, and all procedural requirements of law or rule have been fulfilled. This matter is therefore properly before the Administrative Law Judge.

3. The Administrative Law Judge lacks jurisdiction to award the Petitioners any of the fees and expenses they incurred in the case, *In the Matter of the PERA Salary Determinations Affecting Retired and Active Employees of the City of Duluth*, No. A11-1330 before the Minnesota Court of Appeals.¹³

¹⁰ Affidavit of Elizabeth A. Storaasli, Exhibit (Ex.) A-1, (first document) at 1-10. The Petitioners also submitted evidence of fees relating to the appeal and to this proceeding for an award of fees and expenses pursuant to the MEAJA. However, as discussed above, the ALJ has concluded that those fees are not allowable.

¹¹ Affidavit of Elizabeth A. Storaasli, Ex. A-1 (second document) at 1-3.

¹² Affidavit of Elizabeth A. Storaasli, Ex. A-3.

¹³ See Part I-A of the Memorandum that follows.

4. The Administrative Law Judge lacks authority to award the Petitioners any fees and expenses that they incur in this MEAJA proceeding.¹⁴

5. Pursuant to Minn. Stat. § 15.472(a), the Administrative Law Judge has authority to award the Petitioners fees and expenses that they incurred with respect to *the underlying administrative proceeding*.

6. The Petitioners only partly prevailed in the contested case. They are therefore only entitled to recover the portion of their fees and expenses that represents the extent to which they prevailed on the merits.

7. A reasonable estimate of the extent to which the Petitioners prevailed on the merits of the contested case is 75.3%. They are therefore entitled to that percentage of fees and expenses pursuant to Minn. Stat. § 15.472(a).¹⁵

8. Counsel for the Petitioners provided them with 476.3 hours of legal services while representing them in the contested case. The fees the Petitioners incurred for those hours of legal services are awardable fees under Minn. Stat. § 15.471, subd. 4.

9. The prevailing market rate for the kind and quality of the legal services that counsel for the Petitioners furnished while representing them in the contested case is \$242 per hour.¹⁶

10. The Petitioners are entitled under Minn. Stat. § 15.472(a) to an award of \$86,794.24 for attorneys' fees.

11. All of the \$8,636.43 in expenses that the Petitioners are claiming as litigation expenses in OAH No. 4-3600-20809-2 are awardable expenses under Minn. Stat. § 15.471, subd. 4.

12. The Petitioners are entitled under Minn. Stat. § 15.472(a) to an award of \$6,503.23 of expenses.

13. Any Finding of Fact more properly termed a Conclusion is adopted as such. Any Conclusion more properly termed a Finding of Fact is adopted as such.

14. These Conclusions are reached for the reasons set forth in the Memorandum that follows, which is hereby incorporated into these Conclusions.

Based upon these Conclusions, and for the reasons stated in the following Memorandum, the Administrative Law Judge makes the following:

¹⁴ See Part I-B of the Memorandum that follows.

¹⁵ See Part II of the Memorandum that follows.

¹⁶ See Part III-A of the Memorandum that follows.

ORDER

IT IS ORDERED,

(1) That the Application of Petitioner Douglas Michog for fees and other expenses pursuant to Minn. Stat. § 15.472(a) is **GRANTED**; and

(2) That the Petitioners are **AWARDED** \$93,297.48 in fees and expenses pursuant to Minn. Stat. 15.472(a).

Dated: January 31, 2013

s/Bruce H. Johnson

BRUCE H. JOHNSON
Administrative Law Judge

Decided, by stipulation, on the written record.

MEMORANDUM

I. Under Minn. Stat. § 15.472(a), the Petitioners may only recover fees and expenses that were incurred in the contested case.

This matter began when PERA filed notices of hearing on May 14, 2009, and has involved three separate and distinct administrative and judicial proceedings—a contested case to adjudicate PERA's underlying claims against the Petitioners; an appeal to the Court of Appeals; and this administrative proceeding under the MEAJA to determine whether the Petitioners are entitled to an award of fees and expenses.

The Petitioners argue that they are entitled to recovery of the fees and expenses that they incurred in each of those proceedings. PERA does not dispute that the Petitioners are entitled to the fees and expenses that they incurred during the contested case. However, PERA argues that they are not entitled to fees and expenses incurred during the appeal to the Court of Appeals or during this MEAJA proceeding.

A. The ALJ lacks jurisdiction to award fees and expenses incurred during the judicial appeal.

Minn. R. Civ. App. 139 governs recovery of costs, disbursements, and attorneys' fees by a prevailing party in a case before the Minnesota Court of Appeals. For example, Minn. R. Civ. App. 139.06, subd. 1, sets forth the procedure for recovering attorneys' fees:

A party seeking attorneys' fees on appeal shall submit such a request by motion under Rule 127. The court may grant on its own motion an award of reasonable attorneys' fees to any party. All motions for fees must be

submitted no later than within the time for taxation of costs, or such other period of time as the court directs. All motions for fees must include sufficient documentation to enable the appellate court to determine the appropriate amount of fees.

The question is whether Minn. Stat. § 15.472(a), gives an administrative law judge concurrent jurisdiction to award costs, disbursements, and attorneys' fees incurred by a prevailing party in a judicial appeal. The ALJ concludes that an administrative law judge does not have that authority.

The Minnesota Supreme Court has held that the legislature may not constitutionally enact a state granting to administrative law judges powers that are within the inherent jurisdiction of an Article VI court.¹⁷ Here, interpreting Minn. Stat. § 15.472(a) as empowering an administrative law judge to award a party fees and expenses incurred during a judicial appeal is a construction that would render the statute unconstitutional, as applied. When construing a statute, it must be presumed that the legislature did not intend to violate the Minnesota Constitution.¹⁸ Therefore, in construing the MEAJA, it must be presumed that the Legislature did not intend to violate the Minnesota Constitution by giving administrative law judges unconstitutional authority to award fees and expenses in judicial appeals.

B. The ALJ lacks statutory authority to award fees and expenses incurred in this MEAJA proceeding.

PERA also argues that the Petitioners may not recover fees and expenses incurred in the course of this MEAJA proceeding, citing *State ex rel. Steffen v. Peterson*,¹⁹ a South Dakota case, for the proposition that “‘fees-for-fees’ [are] not available where not specifically authorized by statute.”²⁰ In response, the Petitioners cite an unreported Court of Appeals case, *Estate of Torgersen v. Torgersen*,²¹ for the proposition that “Minnesota law did exclude not fees-for-fees.”²² However, *Torgersen* is distinguishable from this case. There, the underlying civil action was a dispute over an estate. The district court upheld the validity of the will in question and awarded the decedent's personal representative attorneys' fees. The district court's judgment upholding the will was affirmed by the Court of Appeals.²³ *Estate of Torgersen v. Torgersen* was a second appeal involving the reasonableness of the attorneys' fees award. One issue was whether the personal representative could recover fees incurred in securing the attorneys' fees award—in other words, “fees-for-fees.” Although the statute governing awards of attorneys' fees in probate proceedings—Minn. Stat. § 524.3-720—was silent on whether fees-for-fees could be awarded, another provision

¹⁷ *Holmberg v. Holmberg*, 588 N.W.2d 720, 724 (Minn. 1999).

¹⁸ Minn. Stat. § 645.17(3).

¹⁹ 607 N.W.2d 262, 274 (S.D. 2000).

²⁰ PERA's Objections to Petitioners' Application of Fees and Expenses Pursuant to Minn. Stat. § 15.472(a) (PERA's "Objections") at 8-9.

²¹ 2008 W.L. 4224534 (Minn. App. 2008).

²² Petitioners' Reply Memorandum at 14.

²³ *In re Estate of Torgersen*, 711 N.W.2d 545 (Minn. App. 2006).

of the same statute permitted a nominated personal representative to, “in good faith, pursue appropriate legal proceedings without having to risk personal financial loss by underwriting the proceeding’s expenses.” The Court of Appeals concluded that allowing fees-for-fees was necessary to give effect to all of Minn. Stat. §§ 524.3-720’s provisions.²⁴ That is not the case here. There is nothing in Minn. Stat. § 15.471, *et seq.* that requires an award of fees-for-fees in order to give effect to some other provision of the MEAJA.

Moreover, the statute explicitly states that an administrative law judge may only award fees to the prevailing party, other than the state in “a” proceeding. It does not empower an award for fees and other expenses in multiple administrative proceedings, which is, in effect, the result that the Petitioners are seeking. A proceeding under the MEAJA is not part, or an extension of the associated contested case, which invariably arises under an independent jurisdictional statute other than the MEAJA. Here, jurisdiction over the underlying contested case was conferred by Minn. Stat. § 356.96, subd. 12(b). Jurisdiction over this proceeding is found in Minn. Stat. § 15.472(a) itself.²⁵ Thus, the potential entitlement of a party to an award of fees for representation in the underlying proceeding does not, by operation of law, create an entitlement to a fee award in a subsequent MEAJA proceeding.

That result makes sense. Application of the MEAJA’s entitlement criteria may result in different award outcomes with respect to the underlying contested case and MEAJA proceedings. For example, a conclusion on whether PERA’s position on the merits of this fee application proceeding is substantially justified might be different from a conclusion on whether PERA’s position on the merits of the contested case was substantially justified. In summary, the ALJ concludes that the Petitioners may not in this proceeding obtain an award of the fees that they incurred in this proceeding.

II. The Petitioners are entitled to a partial recovery of 75.3 percent of their total allowable fees and expenses incurred in the contested case.

PERA cannot determine the actual amount in controversy in the contested case by comparing the amount of benefits that PERA originally sought to recapture from retirees with the amount that the Court of Appeals’ decision allows PERA to recapture because 60 percent of the affected individuals have not yet retired, and the benefits they will ultimately receive are therefore still subject to many variables.

A. Positions of the parties on apportionment.

The Petitioners prevailed on a major substantive issue relating to whether “deferred compensation payments” constituted salary for purposes of calculating retirement benefits. That result had significant, favorable financial implications for the Petitioners and others similarly situated. On the other hand, PERA prevailed on a major substantive issue relating to whether what were referred to as “insurance supplement

²⁴ See Minn. Stat. § 645.17(2).

²⁵ OAH has assigned this proceeding the same file number as the underlying administrative proceeding as a matter of administrative convenience, not because this proceeding is part of the same case.

payments” constituted salary for purposes of calculating retirement benefits. PERA therefore takes the position that the Petitioners’ fees and expenses should be reduced by one-third because PERA prevailed on another major substantive issue.²⁶ However, PERA offers no rationale for selecting that particular percentage. On the other hand, the Petitioners argue that there should be no reduction of their total cost of representation because PERA prevailed substantively on the insurance supplement issue reasoning that “the insurance supplement claims were a ‘significantly smaller part of the claims in this matter and a smaller part of the litigation.’” Neither position is satisfactory. PERA’s approach has no discernible relation to the relative importance of the major substantive results, and the Petitioners’ approach would elevate them from “a prevailing party” to “*the* prevailing party,” which is not the case.

B. Apportionment of the Petitioners’ fees and expenses should be made based on disposition of the amounts in controversy.

PERA cannot determine the actual amount in controversy in the contested case by comparing the amount of benefits that PERA originally sought to recapture from retirees with the amount that the Court of Appeals’ decision allows PERA to recapture in because 60 percent of the affected individuals have not yet retired, the benefits they will ultimately receive are still subject to many variables.²⁷

However, after the Court of Appeals remanded the case to PERA to carry out the Court’s decision, PERA hired Samuel Morse, and outside consultant, to write computer software and assist in the recalculation of retirement benefits.²⁸ Mr. Morse reviewed a total of \$20,368,509 in deferred compensation insurance supplement payments which the City of Duluth reported as PERA salary. He concluded that \$14,948,359.91 was attributable to deferred compensation that the Court of Appeals determined was valid PERA salary. The remaining \$5,420,150.88 was attributable to insurance supplement payment that the court confirmed was not valid PERA salary.²⁹ Although those amounts may change somewhat when any individual audits are completed, both parties consider them to be reasonable estimates.³⁰ Those amounts are important in measuring success on the merits because their classification as PERA or non-PERA will be a major factor in calculating the retirement benefits of the Petitioners and other current and former City of Duluth employees. The ALJ therefore concludes that comparing those amounts is a reasonable approach to apportioning fees and expenses based on relative success on the merits. Those comparisons indicate that the Petitioners succeeded in having 73.4 percent of the amount that PERA originally challenged as invalid PERA salary re-characterized as valid PERA salary.

Those amounts are also important in measuring success on the merits because they measure the immediate financial loss that retired City of Duluth employees will sustain.

²⁶ PERA’s Objections at 7-8.

²⁷ Affidavit of Barb Bibeau at ¶¶ 5 and 6.

²⁸ Affidavit of Mary Ostman at ¶ 2.

²⁹ *Id.* at ¶ 3.

³⁰ *Id.*; Affidavit of Barb Bibeau at ¶ 7.

A second possible method of measurement is by comparing the amount that PERA originally planned to recover from retirees in retirement benefit overpayments (\$1,242,000) to the amount that PERA will now actually recover in benefit overpayments (\$290,000).³¹ Using that measure, retirees have reduced their liability for benefit overpayments by 77.1 percent. Those amounts are also meaningful because 40 percent of the individuals affected by the outcome of this case have retired and are faced with repayment obligations, in addition to the reductions of future benefits that both active and retired employees will be facing. In other words, retirees represent the group of affected individuals who would have suffered the greatest harm had the suit not been filed. Both of the above approaches to measuring success on the merits quantitatively are relevant and reasonably close in terms of results. The ALJ therefore concludes that averaging the results of both is a reasonable approach under the circumstances to expressing the Petitioners' relative success on the merits in objective terms. That average is 75.3 percent.³²

III. Allowable Fees and Expenses

A. Attorneys' Fees

Counsel for the Petitioners charged them \$220 per hour for the legal work performed while representing them in the underlying contested case.³³ However, under Minn. Stat. § 15.471, subd. 5, the measure of awardable fees is not actual charges, but rather "the amount of fees must be based upon prevailing market rates for the kind and quality of the services furnished." The evidence established that the \$220 hourly rate that counsel charged the Petitioners was actually \$20 per hour less than the \$240 rate that they charged a majority of its clients for similar services in 2011-2012.³⁴ The law firm that represents the Petitioners is a small law firm of 2 to 8 lawyers. In 2011 the nationwide average rate for all attorneys was \$284 per hour.³⁵ The average billing rate for attorneys practicing in the Midwest was somewhat lower—*i.e.*, \$264 per hour. For firms from 2 to 8 lawyers, the national average billing rate was \$262 per hour. No average billing rate information was available for firms of 2 to 8 lawyers in the Midwest. However, because the average national rate for firms of 2 to 8 lawyers was 92 percent of the overall national rate, the ALJ concludes that 92 percent of the Midwest average for firms of 2 to 8 lawyers would be about \$242 per hour. That rate is consistent with the \$240 per hour that counsel for the Petitioners were charging most of their clients in 2011-2012. The ALJ

³¹ *Id.* at ¶ 5.

³² The affidavits submitted by the parties contained some additional numerical comparisons, but the ALJ concluded that those comparisons did not shed meaningful light on the Petitioners' success on the merits. Nonetheless, the ALJ notes that the percentages resulting from those comparisons were largely consistent with the average percentage that the ALJ has calculated.

³³ Affidavit of Elizabeth A. Storaasli at ¶ 4.

³⁴ *Id.*

³⁵ The ALJ took office notice of the information on the nationwide and Midwest averages of billing rates for attorneys in private practice, set forth in the 2013 Rate Proposal and Business Plan that OAH submitted to the Minnesota Department of Management and Budget. See Ex. 1.

therefore concludes that a rate of \$242 per hour represents the “prevailing market rates for the kind and quality of the services furnished.”

The Petitioners submitted itemized and uncontroverted evidence that their counsel performed 476.3 hours of legal services while representing the Petitioners in the underlying contested case.³⁶ At \$242 per hour, that would represent attorneys’ fees of \$115,264.60. Reduced by 24.7 percent because the Petitioners were only a partly prevailing party results in an attorneys’ fee award of \$86,794.24.

B. Allowable Expenses

Minn. Stat. § 15.471, subd. 4, states that the following expenses can be included in a MEJA award:

Subd. 4. Expenses.

"Expenses" means the costs incurred by the party in the litigation, including:

- (1) filing fees;
- (2) subpoena fees and mileage;
- (3) transcript costs and court reporter fees;
- (4) expert witness fees;
- (5) the reasonable cost of any study, analysis, engineering report, test, or project;
- (6) photocopying and printing costs;
- (7) postage and delivery costs; and
- (8) service of process fees.

The Petitioners submitted itemized evidence that their counsel incurred \$7,354.48 in expenses in the course of litigating the contested case.³⁷ All of those expenses are allowable under Minn. Stat. § 15.471, subd. 4. Petitioner Paul Ostman incurred an additional awardable expense when he paid \$1,281.95 for a copy of the contested case hearing transcript. PERA raised no objections to the accuracy of those

³⁶ Affidavit of Elizabeth A. Storaasli, Ex. A-1 at 10. The Petitioners also submitted evidence of fees relating to the appeal and to this proceeding for an award of fees and expenses pursuant to the MEAJA. However, as discussed above, the ALJ has concluded that those fees are not allowable.

³⁷ Affidavit of Elizabeth A. Storaasli, Ex. A-1 at 3.

expenses.³⁸ The total awardable fees are therefore \$8,636.43. PERA suggested that the Petitioners should be allowed the full amount of their fees, but that appears to have been part of a proposal to the Petitioners in which the proposed attorneys' fees award was heavily discounted. The ALJ can discern no policy reason why expenses should not be reduced by the same percentage as attorneys' fees. Thus again, reducing \$8,636.43 by 24.7 percent because the Petitioners were only a partly prevailing party results in an award of other expenses of \$6,503.23.

IV. Conclusion

In view of the foregoing, the reasonable value of the all of the legal services that counsel for the Petitioners provided in the course of representing them in the contested case is \$115,264.60, which represents 476.3 billable hours times a market-based billing rate of \$242 per hour. Because the Petitioners only partially prevailed on the merits, they are only entitled to a MEAJA award for fees of 75.3 percent of that \$115,264.60, or \$86,794.24. The Petitioners also incurred a total \$8,636.43 in litigation expenses associated with the contested case. Again, because they only partially prevailed on the merits, they are only entitled to a MEAJA award for fees of 75.3 percent of that \$8,636.43, or \$6,503.23. The Petitioner's total MEAJA award is therefore \$93,297.48.

B. H. J.

³⁸ The Petitioners also submitted evidence of expenses incurred during the appeal and in this proceeding for an award of fees and expenses pursuant to the MEAJA. However, as discussed above, the ALJ has concluded that those expenses are not allowable.